

**STATE OF WISCONSIN  
DEPARTMENT OF COMMERCE**

**IN THE MATTER OF: The claim for  
reimbursement under the PECFA  
Program by**

MADISON HEARING OFFICE  
1801 Aberg Ave., Suite A  
P.O. Box 7975  
Madison, WI 53707-7975  
Telephone: (608) 242-4818  
Fax: (608) 242-4813

Dorothy E. Schanilec  
P.O. Box 178  
Rosendale, WI 54974-0178

**Hearing Number: 99-107  
Re: PECFA Claim #54974-9703-27**

**PROPOSED HEARING OFFICER DECISION**

**NOTICE OF RIGHTS**

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to the Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

**STATE HEARING OFFICER:**  
James H. Moe

**DATED AND MAILED:**  
May 24, 2000

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**MAILED TO:**

**Appellant Agent or Attorney**

David Scherzer  
Sigma Environ Svcs  
220 E Ryan Road  
Oak Creek, WI 53154-4133

**Department of Commerce**

Kelly Cochrane  
Assistant Legal Counsel  
P.O. Box 7838  
Madison, WI 53707-7838

**STATE OF WISCONSIN  
DEPARTMENT OF WORKFORCE DEVELOPMENT**

*In the Manner of the claim for Reimbursement under the PECFA Program by*

Dorothy E. Schanilec  
P.O. Box 178  
Rosendale, WI 54974-0178

Hearing No. 99-107  
PECFA Claim No. 54974-9703-27

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**PROPOSED DECISION**

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On March 23, 1999, the Wisconsin Department of Commerce (Department) issued a decision denying the request by Dorothy E. Schanilec (Appellant) for reimbursement of costs totaling \$4,404.77 under the Petroleum Environmental Cleanup Fund Act (PECFA). The Appellant filed a timely appeal to a portion of the denied costs, and a hearing was held on May 10, 2000 at Madison, Wisconsin, before Administrative Law Judge James H. Moe.

Based on the applicable records and evidence, in this case, the administrative law judge makes the following

**PROPOSED FINDINGS OF FACT**

1. At all times material, Dorothy E. Schanilec, was the legal owner of the property located at WI 1227 Rose-Eld Road, Rosendale, Wisconsin.
2. The appellant filed a claim for reimbursement of expenses associated with site cleanup at the site in the amount of \$90,653.80. Of that amount, the Department found that \$4,404.77 was not eligible for reimbursement under the PECFA program.
3. The appellant appealed the denial of frost and concrete breaking and removal charges totaling \$4,000.66 invoiced by Progressive Environmental Industries (Invoice # 1618).

## RELEVANT LAW

In relevant part, Wis. Admin. Code § ILHR 47.33(1), provides as follows:

\* \* \*

- (b) *Commodity purchases* 1. All commodity services which include, but are not limited to, soil borings, monitoring-well construction, laboratory analysis, excavation and trucking shall be obtained through a competitive bid process. A minimum of 3 bids are required to be obtained and the lowest cost service provider shall be selected.

\* \* \*

4. An owner or operator may appeal to the department to obtain approval to select other than the lowest cost commodity service provider. The department may approve an appeal if it determines that the use of another service provider will further the goals of the program.

## PROPOSED DISCUSSION

The administrative code requires that commodity services must be obtained through a competitive bid process, with a minimum of three bids, and selection of the lowest cost provider. The Appellant explained that at the time the commodity bids were placed, the excavation work was expected to be performed during the summer of 1995. Financing negotiations between the appellant and her lending institution delayed the excavation work until the winter months, with those services completed in January of 1996. As a result, additional costs associated with frost breaking, which were not bid, were invoiced by Progressive Environmental Industries. The department denied reimbursement of those costs. The department also denied reimbursement of costs associated with concrete breaking services invoiced by Progressive Environmental Industries, which were not bid.

The appellant concedes that the frost breaking and removal, and the concrete removal and disposal services were not competitively bid, but argues that Progressive Environmental still had a total cost lower than the other bidders. This argument is not persuasive. The services at issue here are commodity services within the meaning of the administrative code. That code clearly requires that all commodity services be competitively bid. To interpret the rule to allow for some services to be performed without competitive bidding simply because some other services had been bid by the contractor in question would defeat the purpose of the rule and permit reimbursement for the performance of commodity services without competitive bidding. While the law does permit an owner to request from the Department a waiver from its rules, no such waiver was requested or granted here. Although the frost breaking services were not initially anticipated, the appellant has failed to demonstrate why concrete breaking and disposal services were unexpected items at the time of bidding. The hearing examiner recognizes the difficulty of anticipating every contingency at the time of bidding. However, including a contingency provision in the initial bids would have remedied that difficulty.

Under the circumstances, the appellant failed to demonstrate that the appealed costs fall within the PECFA eligibility requirements. Because the frost breaking and removal and concrete breaking and disposal services were not competitively bid, the Department correctly denied reimbursement of the costs.

### **PROPOSED CONCLUSIONS OF LAW**

The Appellant was an owner or agent of a property covered by the remedial provisions of Wis. Stat. §101.143.

The Department was correct in denying reimbursement of costs totaling \$4,000.66 for services of Progressive Environmental Industries on the basis that those services- were not competitively bid within the meaning of Wis. Admin. Code §ILHR 47.33(l)(b).

### **PROPOSED DECISION**

The Department's decision to deny all contested amounts is affirmed.

Dated: May 24, 2000

By

James H. Moe  
Administrative Law Judge  
Acting as Hearing Examiner for the  
Department of Commerce

99-107/ jhm

**STATE OF WISCONSIN**  
**Department of Commerce**

In the Matter of the PECFA Appeal of.

Dorothy E. Schanilec  
P. O. Box 178  
Rosendale, Wisconsin 54974-0178

PECFA Claim: #54974-9703-27  
Hearing: #99-107

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**Final Decision**

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**Preliminary Recitals**

Pursuant to a Petition for Hearing filed April 19, 1999, under §101.02 (6) (e) Wis. Stats., and §Comm/ILHR 47.53 Wis. Adm. Code, to review a decision of the Wisconsin Department of Commerce (Department), a hearing was commenced on May 10, 2000, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on May 24, 2000 and the parties were provided a period of twenty (20) days to file objections.

The Issue for determination is:

Whether the Department's Decision of March 23, 1999 correctly denied PECFA reimbursement of costs totaling \$4000.66 on the basis that those costs were associated with commodity items not bid.

There appeared in this matter the following persons:

**PARTIES IN INTEREST:**

Dorothy E. Schanilec  
P. O. Box 178  
Rosendale, Wisconsin 54974-0178

Wisconsin Department of Commerce  
PECFA Bureau

201 W. Washington Avenue  
P.O. Box 7838  
Madison, Wisconsin 53707-7838

By: Kelly Cochrane, Esq.  
Assistant Legal Counsel  
Wisconsin Department of Commerce  
201 W. Washington Avenue, Room 322A  
P.O. Box 7838  
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02 (3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

#### **FINDINGS OF FACT**

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

#### **CONCLUSIONS OF LAW**

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

#### **DISCUSSION**

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

#### **- FINAL DECISION**

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

#### **NOTICE TO PARTIES**

Request for Rehearing

This is a final agency decision under §227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important of you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in § 227.49 Wis. Stats.

#### Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated: 12/7/00

Martha Kerner

Executive Assistant  
Wisconsin Department of Commerce  
201 West Washington Avenue  
P.O. Box 7970  
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager  
Unemployment Insurance Hearing Office  
1801 Aberg Avenue, Suite A  
Madison, Wisconsin 53707-7975

Date Mailed: 12/8/2000

Mailed By: Linda K. Esser

**STATE OF WISCONSIN  
DEPARTMENT OF COMMERCE**

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*In the Matter of the PECFA Appeal of*

Dorothy E. Schanilec



PO Box 178  
Rosendale WI 54974-0178

PECFA Claim # 54974-9703-27  
Hearing #99-107

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**DELEGATION ORDER -- PECFA APPEAL**

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I, Brenda J. Blanchard, Secretary of the Department of Commerce, pursuant to §227.46(3)(a), Stats., do hereby delegate to the administrative law judge assigned to the above captioned appeal the authority to issue a final decision if a contested case hearing is not held because of withdrawal, default, settlement, untimeliness of the appeal, mootness of the appeal, lack of subject matter jurisdiction, or lack of standing to appeal. Pursuant to §227.46(3)(c), Stats., if a decision addressing the merits of the appeal is required or it is decided on any basis not delegated to the administrative law judge as described above, it shall be issued by the administrative law judge pursuant to the procedures in §227.46(2) as a proposed decision, and the Executive Assistant of the Department, Martha Kerner, shall make the final decision for the department.

Dated: April 21, 1999

Brenda Y Blanchard  
Secretary  
Department of Commerce

Copies to:

Dorothy E. Schanilec  
PO Box 178  
Rosendale WI 54974-0178

Kelly Cochrane, Assistant Legal Counsel  
Office of the Secretary  
Department of Commerce  
P O Box 7838  
Madison WI 53707-7838